No. 95-2074

(32)

Supreme Court, U.S.
FILED
JAN 10 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1995

CITY OF BOERNE, TEXAS,

Petitioner,

—versus—

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

—and—

UNITED STATES OF AMERICA,

Intervenor-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE COALITION FOR THE FREE EXERCISE OF RELIGION IN SUPPORT OF RESPONDENTS

MARC D. STERN
Counsel of Record
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, New York 10028
(212) 360-1545

Of Counsel Listed Inside

Of Counsel

Oliver S. Thomas
Special Counsel
NATIONAL COUNCIL OF CHURCHES
2708 Montvale Road
Maryville, TN 37801
(423) 977-9046

J. Brent Walker
Melissa Rogers
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
200 Maryland Avenue
Washington, D.C. 20002-5797
(202) 544-4226

Steven T. McFarland
Center for Law and Religious Freedom
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane - Suite 222
Annandale, VA 22003
(703) 642-1070

Aron U. Raskas
Nathan J. Diament
Institute for Public Affairs
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
333 Seventh Avenue
New York, NY 10001
(212) 563-4000

Of Counsel (cont'd)

Michael Farris
HOME SCHOOL DEFENSE ASSOCIATION
P. O. Box 159
Paeonian Springs, VA 22129
(703) 338-5600

Samuel Rabinove
Richard Foltin
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022
(212) 751-4000

Elliot Mincberg
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, DC 20036
(202) 467-4999

David Zwiebel, Esq.
AGUDATH ISRAEL
84 William Street
New York, NY 10038
(212) 797-9000

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, NY 10036
(212) 382-0557

Of Counsel (cont'd)

Steven K. Green
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1816 Jefferson Place
Washington, DC 20036
(202) 466-3234

Jack F. Trope
Association of American Indian Affairs
P.O. Box 268
Sisseton, SD 57262
(605) 698-3998

CERTIFICATE OF INTEREST

The undersigned, counsel of record for the *amici*, furnishes the following list pursuant to U.S. Sup.Ct. R. 26.6:

COALITION FOR THE FREE EXERCISE OF RELIGION

All of the members of the Coalition are corporations, and have no parents or subsidiaries, except as indicated below.

Agudath Israel of America
Aleph Institute
American Association of Christian Schools
American Baptist Churches USA
American Civil Liberties Union
American Conference on Religious Movements
American Ethical Union, Washington Ethical Action Office
American Humanist Association
American Jewish Committee
American Jewish Congress
American Muslim Council
Americans for Democratic Action
Americans for Religious Liberty
Americans United for Separation of Church & State
Anti-Defamation League
Association of Christian Schools International
Association on American Indian Affairs
Baptist Joint Committee on Public Affairs
B'nai B'rith
Central Conference of American Rabbis
Christian Church (Disciples of Christ)
Christian Life Commission, Southern Baptist Convention
Christian Science Committee on Publication*
Church of Jesus Christ of Latter-day Saints
Church of the Brethren
Church of Scientology International

Certificate of Interest (Cont'd)

Coalition for Christian Colleges and Universities
Coalitions for America
Concerned Women for America
Council of Jewish Federations
Council on Religious Freedom
Council on Spiritual Practices
Criminal Justice Policy Foundation
Episcopal Church
Evangelical Lutheran Church In America
Federation of Reconstructionist Congregations and Havurot
Friends Committee on National Legislation
General Conference of Seventh-day Adventists*
Guru Gobind Singh Foundation****
Hadassah, the Women's Zionist Organization of America, Inc.
Home School Legal Defense Association
International Association of Jewish Lawyers and Jurists
International Institute for Religious Freedom
Japanese American Citizens League
Jewish Reconstructionist Federation
Justice Fellowship
Liberty Counsel
Mennonite Central Committee U.S.**
Muslim Prison Foundation
Mystic Temple of Light, Inc.
National Association of Evangelicals
National Campaign for a Peace Tax Fund
National Committee for Public Education and Religious Liberty
National Council of Churches of Christ in the USA
National Council of Jewish Women
National Federation of Temple Sisterhoods
National Jewish Commission on Law and Public Affairs
National Jewish Community Relations Advisory Council
National Sikh Center

Certificate of Interest (Cont'd)

Native American Church of North America
Native American Rights Fund
North American Council for Muslim Women
People For the American Way Action Fund
Peyote Way Church of God
Presbyterian Church (USA), Washington Office
Rabbinical Council of America
Sacred Sites Inter-faith Alliance
Soka-Gakkai International - USA
Traditional Values Coalition
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
Unitarian Universalist Association of Congregations
United Church of Christ, Office for Church in Society***
United Methodist Church, Board of Church & Society
United Synagogue of Conservative Judaism

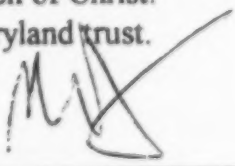
---

* Unincorporated association.

** The Mennonite Central Committee, U.S. is a part of the Mennonite Central Committee, Inc.

*** The parent organization of the Office for Church in Society is the Executive Council of the General Synod of the United Church of Christ.

**** Organized as a Maryland trust.



Marc D. Stern
Counsel of Record
AMERICAN JEWISH CONGRESS
15 East 84th Street
New York, NY 10028
(212) 360-1545

TABLE OF CONTENTS

CERTIFICATE OF INTEREST .

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. RFRA DOES NOT ESTABLISH RELIGION 3

A. RFRA Does Not Impermissibly Favor Religion Over Non-Religion 3

i. Case Law Recognizes the Permissibility of Accommodation 6

ii. Legislative Precedents Support the Constitutionality of Exemptions 7

B. RFRA Does Not Create Impermissible Entanglement With Religion 8

C. RFRA's Broad Scope Minimizes the Likelihood of Religious Favoritism in the Granting of Accommodation 11

II. RFRA WAS AN APPROPRIATE EXERCISE OF CONGRESS' POWER UNDER § 5 OF THE FOURTEENTH AMENDMENT 13

A. RFRA Facilitates Enforcement of the Ban Against Religious Discrimination 12

B. Congress Has Broad Power to Guard Against Purposeful Religious Prejudice 16

C. RFRA is But the Latest Example of Congress' Exercise of a Broad § 5 Power 18

i. Title VII and the States 18

ii. The Voting Rights Act 18

D. The Framers of the Fourteenth Amendment Intended to Protect Religious Liberty 21

E. The Legal and Political Background of the Fourteenth Amendment Supports Congress' Power To Enact RFRA 23
III. RFRA IS FULLY CONSISTENT WITH THE SEPARATION OF POWERS 24
A. Separation of Powers Doctrine Does Not Bar Corrective Legislation 25
B. RFRA Does Not Impose a Rule of Decision 26
C. *Klein* Does Not Proscribe Use of Legislative Standards 27
D. RFRA is Fully Consistent With *Marbury* and *Cooper* 28
CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Ableman v. Booth, 62 U.S. 506 (1858) 23

Adarand Construction, Inc. v. Pena, 115 S.Ct. 2097 (1995) 21

Arlan's Dep't Store v. Kentucky, 371 U.S. 218 (1962) 5

Armstrong v. Wilson, 942 F.Supp. 1252 (N.D. Cal. 1996) 21

Ashwander v. TWA, 297 U.S. 288 (1936) 3, 9

Barclays Bank PLC v. Franchise Tax Board, 114 S.Ct. 2268 (1994) 26

Board of Educ. v. Grumet, 114 S.Ct. 2481 (1994) . 4, 5, 6, 11

Bowen v. Kendrick, 487 U.S. 589 (1988) 5

Braunfield v. Brown, 366 U.S. 599 (1961) 5

Buckley v. Valeo, 424 U.S. 1 (1976) 30

Campos v. Coughlin, 854 F.Supp. 194 (S.D.N.Y. 1994) . . 14

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) 12, 13, 14

City of Mobile v. Bolden, 446 U.S. 55 (1980) 18, 25, 28

City of Richmond v. J.A. Crosson, 488 U.S. 469 (1989) . . 23

City of Rome v. United States, 446 U.S. 156 (1980) . . 18, 19

Cooper v. Aaron, 358 U.S. 1 (1958) 28

Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) 4, 5

Dred Scott v. Sanford, 60 (19 Howard) U.S. 393 (1857) . . 23

EEOC v. Wyoming, 460 U.S. 226 (1983) 16

Employment Division v. Smith, 494 U.S. 872 (1990) . *passim*

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 6, 7

Ex Parte Virginia, 100 U.S. 339 (1879) 16

Ex parte Klein, 13 Wall.128 (1872) 26, 27

F.W. Woolworth v. NLRB, 121 F.2d 658 (2d Cir. 1941) . . . 14
Fitzpatrick v. Bitker, 427 U.S. 445 (1976) 17, 18
Fullilove v. Klutznick, 448 U.S. 448 (1980) 17, 20, 21
Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1985) 4
Hutto v. Finney, 437 U.S. 678 (1982) 21
Jolly v. Coughlin, 76 F.3d 468 (2nd Cir. 1996) 9
Jordan v. Winter, 604 F.Supp. 807 (N.D. Miss. 1984) 19
Kaufman v. Carter, 1996 W.L. 731925 (E.D. Mich. 1996) 21
Keeler v. Mayor and City Council of Cumberland, 940 F.Supp. 879 (Md. 1996) 9, 26
Larson v. Valente, 456 U.S. 228 1982) 13
Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) 20, 25
Leblanc-Sternberg v. Fletcher, 67 F.3d 412 (2nd Cir. 1995) 13
Lemon v. Kurtzman, 403 U.S. 602 (1971) 5
Loving v. U.S., 116 S.Ct. 1737 (1996) 29
Lyng v. Northwest Indian Cemetery Protective Assoc., 485 U.S. 435 (1988) 9
M.L.B. v. S.L.J., 65 U.S.L.W. 4035 (1996) 18
Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996) 9
Major v. Treen, 574 F.Supp. 325 (E.D. La. 1983) 19
Marbury v. Madison, 5 U.S. 137 (1803) 28
McIntire's Case, Fed. Cas. No. 8,824 (C.C. Dist. Col. 1803) 8
Mississippi Islamic Center v. City of Starkville, 876 F.2d 465 (5th Cir. 1989) 14
Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1985) 19

Monnell v. City of New York, 436 U.S. 658 (1988) 24
Morgan v. Katzenbach, 384 U.S. 641 (1966) 12, 17
Niece v. Fitzner, 941 F.Sup. 1497 (E.D. Mich. 1994) ... 21
Norwood v. Harrison, 413 U.S. 455 (1977) 4
Oregon v. Mitchell, 400 U.S. 112 (1970) 20, 25
Personnel Administrator v. Feeney, 442 U.S. 256 (1979) . 18
Plaut v. Spendthrift Farms, Inc., 115 S.Ct. 1447 (1995) .. 28
Prigg v. Pennsylvania, 42 U.S. 539 (1842) 24
Quern v. Jordan, 440 U.S. 332 (1979) 24
Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992) 27
Rosenberger v. Rector, 115 S.Ct. 2510 (1995) 12
Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996), petition for cert. pending, No. 96-710 ..... 8, 9
School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 12
Sherbert v. Verner, 374 U.S. 398 (1963) 9, 10, 30
Small v. Lehman, 98 F.3d 762 (3rd Cir. 1996) 9
Smith v. North Babylon School District, 844 F.2d 90 (2d Cir. 1988) 10
South Carolina v. Katzenbach, 383 U.S. 307 (1966) .. 20, 26
Texas Monthly v. Bullock, 489 U.S. 1 (1989) 4, 6
The Jesus Center v. Farmington Hills ZBA, 215 Mich.App. 54, 544 N.W.2d 698 (1996) 9
Thornburg v. Gingles, 478 U.S. 30 (1986) 19, 28
Tony and Susan Alamo Foundation v. Secretary, 471 U.S. 290 (1985) 10
Underwood v. Hunter, 471 U.S. 222 (1985) 13
United States v. Seeger, 380 U.S. 163 (1965) 3, 8
Walz v. Tax Comm'r, 397 U.S. 664 (1970) 5, 8
Welsh v. United States, 398 U.S. 333 (1970) 3

Wisconsin v. Yoder, 406 U.S. 205 (1972) 3, 4
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 29
Zorach v. Clauson, 343 U.S. 306 (1952) 11
Zurcher v. Stamford Daily, 436 U.S. 547 (1978) 26

STATUTES

1 U.S.C. §1, *s.v.* - oath 7
28 U.S.C. § 459, 953 8
42 U.S.C. § 1973 19
42 U.S.C. §1973aa 20
Art. I, § 8 ..... 16, 27
Art. VI, cl. 3 8
Fed.R.Civ.P. 43(d) 8
Fed.R.Evid. 603 8
Privacy Protection Act of 1980, 42 U.S.C. § 2000aa 26
Religious Freedom Restoration Act, 42 U.S.C. §2000bb, *et seq* ..... *passim*
Title VII, 42 U.S.C. §2000e-1(a), *et seq.* 5, 18, 28
Voting Rights Act, 42 U.S.C. 1973, *et seq.* ... 18, 19, 26, 28

LEGISLATIVE HISTORY

H.R. Rep. 103-88 15
S.1093, 104th Cong., 1st Sess., Cong.Rec. (S)10895 (July 28, 1995) 30
S.Report 103-11, 103rd Cong., 1st Sess. 15

OTHER AUTHORITIES

A. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1222-24 (1992) 23

Ark. O.A.G., 93-414, (1994) 27

Constitution of the United States of America. Analysis and Interpretation (1987) at 963-64 7

E.M. Maltz, Civil Rights, The Constitution and Congress 1863-69 (1996) 25

J.B. James, The Ratification of the Fourteenth Amendment (1984) 24

K. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exception Under the Fourteenth Amendment*, 88 N.W.U. L.Rev. 1106 (1994) 22

Md. O.A.G., Opinion 94-037 (1994) 27

M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L.Rev. 1409 (1990) 7

M.Pawa, When The Supreme Court Suppresses Constitutional Rights, Can Congress Save Us?, 141 U.Pa. L.Rev. 1029 (1993) 18

P.Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Washington L.Rev. 915 (1992) 7

R.J. Kaczorowski, The Nationalization of Civil Rights - Constitutional Theory and Practice in a Racist Society, 1866-1883 (1987) 25

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

INTEREST OF THE *AMICI*

The Coalition for the Free Exercise of Religion ("Coalition") is a coalition of over sixty religious and civil liberties organizations. These organizations represent almost every major faith group in America, spanning the spectrum of religious diversity in America—Christians, Jews, Moslems, Native Americans and Sikhs. The Coalition includes religious liberals and conservatives, and groups with world views as disparate as People for the American Way and Concerned Women for America. They are united by the conviction that the protection of religious liberty is an essential element of a democratic society. (Its members are listed in Appendix A.) The Coalition was called into being in response to the decision of this Court in *Employment Division v. Smith*. It drafted, lobbied for, and ultimately secured the passage of, the Religious Freedom Restoration Act ("RFRA").

The Coalition takes no position on the question of whether RFRA requires the City of Boerne to adjust its landmarks preservation law to accommodate the religious obligations of Bishop Flores. This brief addresses only the question of whether RFRA is a constitutionally legitimate exercise of Congressional power.

The brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

1. (a) This Court has repeatedly held that government can constitutionally accommodate religion. It invited such accommodation in *Employment Division v. Smith*, and in numerous earlier cases. *Corporation of the Presiding Bishop v. Amos* establishes that the three-part test does not invalidate all accommodation.

(b) Since the beginning, legislatures have granted exceptions for religious objectives to secular laws, one of which

(the substitute of an affirmation for oath) is found in the Constitution itself.

(c) RFRA is constitutional even in light of cases such as *Estate of Thornton v. Caldor, Inc.* and *Texas Monthly v. Bullock*. Unlike these cases, RFRA does not require accommodation without a showing of a substantial burden on religious practice and without regard to the impact on third parties.

(d) Unlike case-by-case accommodation—which Petitioners advocate—accommodation under RFRA is available to all religious practitioners, without regard to their size or political clout. RFRA treats all religions equally. It does not require an inquiry into centrality, which might be entangling.

2. (a) This Court has repeatedly upheld Congress' power under § 5 to draft statutes which reach beyond the Amendment's core prohibitions to compensate for difficulties of proving violations. These principles sustain § 2 of the Voting Rights Act, as well as its ban on literacy tests, and Title VII of the 1964 Civil Rights Act (as it applies to state and local government). All that is necessary is that a "violation be lurking," a condition met here. Intentional religious discrimination in the granting or withholding of exemptions is unconstitutional and does exist. No formal fact-finding is required to justify an exercise of the power in this way.

(b) The legislative history of the Fourteenth Amendment indicates an intent to protect religious liberty. Moreover, under the then regnant philosophy of *Prigg v. Pennsylvania*, it was unnecessary to include § 5 to empower Congress to enforce § 1 of the Amendment. Taken together, these background facts counsel a broad reading of § 5.

3. (a) The separation of powers doctrine does not prevent Congress from reexamining the practical results of this Court's constitutional decisions and, if appropriate, addressing these results under one of its powers. When it does so, Congress

exercises a balancing function as important to the constitutional scheme as the separation of powers.

(b) *Ex Parte Klein*'s ban on rule of decision is inapplicable. RFRA is a permissible change of federal statutory law, not a direction to courts how to decide specific cases. Nor does *Klein* prohibit Congress from legislating a broadly applicable standard, as opposed to specific rules.

ARGUMENT

I. RFRA DOES NOT ESTABLISH RELIGION

A. RFRA Does Not Impermissibly Favor Religion Over Non-Religion

Petitioners first contend that RFRA violates the Establishment Clause because it "privileges religion over all other types of beliefs and [] meddles[] with the religious life of the nation."[1] [Cert. Petition at 19-20; Brief at 49.] This is an attack not on RFRA, but on all religious accommodation. It asserts that the government is required to be indifferent to the impact of its policies on religion and that government can shape its actions to accommodate all interests but religious ones. The argument ignores numerous precedents.

Employment Division v. Smith, 494 U.S. 872 (1990), implicitly rejects this argument. The majority there invited

---

1. The Act does not define religion. This Court's precedents have alternatively insisted on a theistic definition of religion, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and a non-theistic one, *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). The issue has not yet arisen in the RFRA context. Courts have allowed RFRA claims to be made by members of a truly broad spectrum of religions, including non-traditional ones. Plainly religion should be given a generous construction so as not to set up government endorsed criteria for religion, a construction that would avoid potential constitutional difficulties. *Cf. Ashwander v. TWA*, 297 U.S. 288 (1936).

legislative exemptions for religious practices. "[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in legislation as well ...." 494 U.S. at 890. Petitioners must believe that the Court was urging legislatures to violate the Constitution.

It was not only Justice Scalia who recognized the legitimacy of legislative exemptions. Before and after *Smith*, other Justices (including every sitting Justice except Justice Breyer, who has not yet considered the question), have rejected the argument that legislative accommodation of religion necessarily establishes religion:

> [T]he Constitution allows the state to accommodate religious needs by alleviating special burdens. ... [I]n commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is "ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference ....'" (Citations omitted.)

Board of Educ. v. Grumet, 114 S.Ct. 2481 (1994). 114 S.Ct. at 2492-93 (Souter, Blackmun, Stevens, O'Connor and Ginsburg, JJ.); *id.* at 2501 (Kennedy, J., concurring); *id.* at 2511-12 (Scalia, Rehnquist and Thomas, JJ., dissenting). Those declarations broke no new ground. *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-36 (1987); *id.* at 341 (Brennan, J., concurring); *id.* at 347-48 (O'Connor, J., concurring); *Texas Monthly v. Bullock*, 489 U.S. 1, 17-21 (1989) (plurality opinion of Brennan, J.); *id.* at 327 (concurring opinion of O'Connor, J.); *id.* at 29-44 (Scalia, J., dissenting); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 145. n.11 (1985); *Norwood v. Harrison*, 413 U.S. 455 (1977); *Wisconsin v. Yoder*, 406 U.S.

205 (1972); *Walz v. Tax Comm'r*, 397 U.S. 664 (1970); *Sherbert v. Verner*, 374 U.S. 398 (1963).

In 1961, this Court upheld Sunday Blue Laws against free exercise challenges by Saturday Sabbath observers. While observing that exempting Sabbatarian merchants might create unfair competition, it nevertheless suggested that a statutory exemption might be appropriate. *Braunfield v. Brown*, 366 U.S. 599, 608 (1961). A year later, it upheld just such a statute against an Establishment Clause challenge by a competing merchant. *Arlan's Dep't Store v. Kentucky*, 371 U.S. 218 (1962).

Petitioners' Establishment Clause argument is understandably devoid of precedential support other than a half-hearted invocation of the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). [Petitioners' Brief at 47-48.] The *Lemon* argument was made, and rejected, in *Amos*[2] for reasons that are equally applicable here. In *Amos*, this Court applied the *Lemon* test to the broad religious corporation exemption of Title VII, 42 U.S.C. §2000e-1(a), and found that a statute exempting organizations from anti-discrimination law had the secular purpose of "allevia[ting] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 438 U.S. at 385. It did not have the primary effect of advancing religion, in the Court's view, because it merely allowed the church to do what it would have done anyway. *Id.* at 337. And, even assuming that there is any relevance of the entanglement test in the context of activities other than recurring appropriations, *Bowen v. Kendrick*, 487

---

2. The status of the three-part test is not entirely clear. Compare *Board of Educ. v. Grumet*, 114 S.Ct. at 2494-95 (Blackmun, J.) with *id.* at 2498-99 (O'Connor, J.). The *amici* themselves are divided on the desirability and vitality of that test.

U.S. 589 (1988), RFRA, like the Title VII exemption, does not require any weighing of the relative importance of religious beliefs, see Point I.B., *infra*, which would entangle courts in religious questions.

i. Case Law Recognizes the Permissibility of Accommodation

The argument from precedent for the facial invalidity of accommodation rests on *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), and *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). Neither sustains the argument. *Texas Monthly* struck a Texas sales tax imposed on secular, but not religious, magazines. Even Justice Brennan's plurality opinion, the judicial high water mark of Establishment Clause restrictions on accommodation, sustains RFRA. Justice Brennan explained that an accommodation which neither imposes substantial burdens on third parties nor subsidizes religious practice in ways unrelated to the alleviation of a burden on religious practice will not be invalidated as an impermissible preference. 489 U.S. at 15 and 18, n.8. See also *Board of Educ. v. Grumet*, 114 S.Ct. at 2501 (Kennedy, J., concurring).

RFRA applies only when government imposes a substantial burden on religious practice. It thus easily passes the second of Justice Brennan's tests, that an accommodation ease a governmental burden on religion. In the vast majority of cases, religious accommodation does not impose a substantial burden on others. Where it does, a state may well have a compelling interest in not accommodating religion.

Justice Brennan's opinion did not command a majority. Justice White concurred on freedom-of-the-press grounds. Three Justices (per Justice Scalia) objected that Justice Brennan's opinion tilted too far against free exercise, for "our cases make plain that it is permissible for a State to act with the purpose and effect of limiting governmental interference with the exercise of

religion." *Id.* at 40. Two other Justices (O'Connor and Blackmun), while finding the Texas statute infirm for directly subsidizing religious speech while not funding directly competitive secular speech, also argued that Justice Brennan's formulation cabined permissible accommodation too narrowly, subordinating the Free Exercise Clause to the Establishment Clause. *Id.* at 27. Taken together, nothing in these opinions remotely sustains the claim that RFRA establishes religion.

Estate of Thornton v. Caldor, Inc., involved a statute that absolutely required employers to accommodate the Sabbath observances of their employees. Moreover, no religious practice other than Sabbath observance was protected. As Justice O'Connor noted in her concurrence, that case did not compel the invalidation of more universal and flexible forms of accommodation. 472 U.S. at 711-12. RFRA applies to all religious practices. Its compelling interest defense provides the flexibility wholly absent in *Caldor, Inc.*

ii. Legislative Precedents Support the Constitutionality of Exemptions

Legal historians disagree whether exemptions were mandatory or merely permissive in the early years of the Republic, compare M. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L.Rev. 1409 (1990) with P. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Washington L.Rev. 915 (1992). There is, however, no gainsaying the fact that religious exemptions from neutral laws have long been granted by legislatures.

The Constitution itself exempts those with religious exemptions from taking the prescribed oath, Art. VI, cl. 3, permitting an affirmation in its place. Congress soon followed that policy for witnesses, an exemption which continues uninterrupted to this day. 1 U.S.C. §1, *s.v.* - oath; 28 U.S.C. §

459, 953; Fed.R.Civ.P. 43(d); Fed.R.Evid. 603; McIntire's Case, Fed. Cas. No. 8,824 (C.C. Dist. Col. 1803). Conscientious objectors have enjoyed an exemption from compulsory military service from the earliest days of the Republic. *United States v. Seeger*, 380 U.S. 163 (1965). Churches enjoyed the benefit of real property tax exemption from an early date. *Walz v. Tax Comm'r*, 397 U.S. 664 (1970).

James Madison, a leading separationist, proposed as part of the Bill of Rights guaranteeing the right of conscience against state interference. Constitution of the United States of America: Analysis and Interpretation (1987) at 963-64. Madison saw no inconsistency between not establishing religion and insulating individual believers from the coercive power of the state. In short, wherever one looks for guidance, the position of Petitioners runs athwart history.

B. RFRA Does Not Create Impermissible Entanglement With Religion

A second argument made against RFRA is that it plunges courts into the morass of deciding whether a practice is central to the claimant's religion. See, e.g., *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996), petition for cert. pending, No. 96-710. Petitioners echo this claim. "The Act necessarily fails the entanglement prong by forcing every government to become expert on every religion." [Petitioners' Brief at 48.] They warn that legislatures will be forced to conduct official investigations of the universe of religious beliefs in order to comply with RFRA.

That argument rests on a misunderstanding. RFRA does not invalidate any statute before it creates a substantial burden on religious practice. No government need worry about the possibility that a particular Act may some day trench on someone's religious practice, nor need it conduct a survey of all world religions to determine whether any adherents might be

affected by a proposed action. RFRA requires only that, when a conflict is called to government's attention, it accommodate that practice if not in conflict with a compelling interest. Petitioners' rhetorical specter of a government commission investigating all religion is frightening; it merely has nothing to do with RFRA.

Equally wrong is the argument that RFRA is entangling because it applies only where a substantial burden is imposed on a practice central to a faith. Centrality is not a threshold question under RFRA. Nothing in the phrase "substantial burden" necessitates an inquiry into centrality. The a "burden" threshold is drawn from this Court's opinion in *Sherbert v. Verner*, *supra*, 374 U.S. at 403. *Sherbert* has survived *Smith*, *Keeler v. Mayor and City Council of Cumberland*, 940 F.Supp. 879 (Md. 1996). But if the inquiry necessary to determine if a religious practice imposes a substantial burden creates excessive entanglement, *Sherbert*, too, fails on Establishment Clause grounds.

The sponsors of RFRA demonstrated a detailed acquaintance with this Court's Free Exercise decisions. They must be presumed to have been aware of this Court's holdings that courts could not inquire into centrality. See *Employment Division v. Smith*, 494 U.S. at 886-87; *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 435 (1988). Nothing in the legislative history suggests that Congress insisted on such an inquiry for RFRA. Familiar canons counsel against reading a statute to create a constitutional difficulty. *Ashwander v. TWA*, 297 U.S. 288 (1936). Several courts have rejected a centrality threshold. *Sasnett v. Sullivan*, 91 F.3d 1018 (7th Cir. 1996); *Mack v. O'Leary*, 80 F.3d 1175 (7th Cir. 1996); *Jolly v. Coughlin*, 76 F.3d 468 (2nd Cir. 1996); *The Jesus Center v. Farmington Hills ZBA*, 215 Mich.App. 54, 544 N.W.2d 698 (1996). Contra, e.g., *Small v. Lehman*, 98 F.3d 762 (3rd Cir. 1996). As the Second Circuit put it:

> [T]he judiciary has but a "limited function ... in determining whether beliefs are to be accorded [RFRA] protection." Our scrutiny extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature. Any inquiry any more intrusive would be inconsistent with our nation's fundamental commitment to individual religious freedom; thus, courts are not permitted to ask whether a particular belief is appropriate or true—however unusual or unfamiliar the belief may be.

76 F.3d at 476 (citations omitted).

The "substantial burden" language of §2000bb-1 is not rendered superfluous by this reading. Some religion-state conflicts can be avoided without any compromise of religious practice. In *Tony and Susan Alamo Foundation v. Secretary*, 471 U.S. 290 (1985), a church challenged a ruling requiring it to pay adherents working in church enterprises the minimum wage. The church objected that its adherents were religiously bound not to enrich themselves at its expense, and that their receipt of wages from the church interfered with that obligation. This Court noted, however, that adherents remained free to donate their earnings to the church or to be paid with in-kind services. The challenged statute worked no burden on the church that it could not avoid without modifying its religious practices. RFRA's "substantial burden" language codifies this holding.

The "substantial burden" test also excludes claims where the secular burden is too trivial to coerce religious behavior or to serve as a likely vehicle for discriminating against unpopular faiths. *Sherbert* rests on the insight that substantial indirect penalties on religious practice coerce religious behavior as much as a direct ones. But some secular benefits are trivial and their denial no burden. In *Smith v. North Babylon School District*, 844 F.2d 90 (2d Cir. 1988), a student objected to the scheduling

of her high school graduation on her Sabbath. She asserted that the school was obligated to accommodate her by rescheduling it. The Second Circuit held that the benefit of attendance at graduation was too insignificant to exert pressure on Smith to compromise her faith. This rule, too, is embodied in the "substantial burden" language.

C. RFRA's Broad Scope Minimizes the Likelihood of Religious Favoritism in the Granting of Accommodation

Petitioners insist that accommodation should be worked retail (despite their apparent inconsistence with almost all of their Establishment Clause argument [Petitioners' Brief at 48]). Such exemptions, often designed to alleviate the problem of a particular faith group, may be granted unfairly by legislatures, which may well respond only to powerful, popular and sympathetic religions. See *Smith*, 494 U.S. at 890.

That *ad hoc* potential is not without potentially serious constitutional repercussions. "The anomalous case-specific nature of ... legislative authority ... leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the establishment clause, that government should not prefer one religion to another, or religion to non-religion." *Board of Educ. v. Grumet*, *supra*, 114 S.Ct. at 2491. *Id.* at 2497 (O'Connor, J., concurring).

RFRA requires religious accommodation wholesale. It allows any faith, no matter how small, unpopular or politically ineffectual, to press its claims before a neutral arbiter under an objective and religiously neutral standard. The consideration and adjudication of RFRA claims facilitates judicial review for fairness and minimizes favoritism to the vanishing point. Petitioners ask this Court to choose between their retail model, which virtually invites religious favoritism, and RFRA's wholesale approach, far less susceptible to manipulation. There is no

question as to which policy poses less risk to Establishment Clause values.

Petitioners construe the Establishment Clause to require the government to ignore the impact of its practices on religious observers. They have forgotten this Court's declaration that the Constitution does not require that. *Zorach v. Clauson*, 343 U.S. 306 (1952). Moreover, without the ability to exempt religious belief from the scope of neutral regulation, legislatures would often be forced to choose between legislating for the public good or imposing rules on religious institutions and individuals that force a violation of their view of God's will, a result public opinion will often not tolerate. In areas as diverse as abortion, gay rights, landmark preservation, employment and public education, the result will be a reluctance to legislate altogether.

Thirty-five years ago, Justices Goldberg and Harlan warned against reading the Establishment Clause to require an all pervasive secularism. *School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion). Petitioners invite this Court to ignore that warning. Their invitation should be declined.

II. RFRA WAS AN APPROPRIATE EXERCISE OF CONGRESS' POWER UNDER § 5 OF THE FOURTEENTH AMENDMENT

Congress' power to enact RFRA turns on the scope of § 5 of the Fourteenth Amendment. Petitioners argue for a narrow reading of that power, particularly on some of the broader reaches of *Morgan v. Katzenbach*, 384 U.S. 641 (1966). *Amici* believe that Petitioners read the Fourteenth Amendment too narrowly. As interesting as the question of the scope of § 5 is, it is unnecessary to reach it. RFRA easily fits within the narrowest possible reading of § 5—that Congress has the power to ensure that core prohibitions of the Amendment are effectively redressed.

A. RFRA Facilitates Enforcement of the Ban Against Religious Discrimination

The Free Exercise and the Equal Protection Clauses prohibit intentional governmental discrimination against religion generally or against a specific religion, *Rosenberger v. Rector*, 115 S.Ct. 2510 (1995); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Larson v. Valente*, 456 U.S. 228 (1982). So would a discretionary action by a local body, such as a zoning board, designed to exclude a particular faith. *Leblanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir. 1995). That ban on religious discrimination is not circumvented by cloaking discrimination in neutral garb, just as the bar on racial discrimination is not elided by overt neutrality. *Church of the Lukumi Babalu Aye*, *supra*; *cf. Underwood v. Hunter*, 471 U.S. 222 (1985). Even a facially neutral statute or act should be struck if motivated by religious bias. Unfortunately, such animus is hard to document.

Church of the Lukumi Babalu Aye considered a facially neutral ordinance banning animal slaughter. The City of Hialeah asserted health, sanitation and animal rights justifications when challenged by the church whose religious ritual of animal sacrifice was outlawed by the ordinances. After a nine-day trial, a seasoned district court judge found no evidence of religious discrimination. 723 F.Supp. 1467 (S.D. Fla. 1989). Three experienced circuit judges affirmed. 936 F.2d 586 (11th Cir. 1991).

This Court unanimously reversed. Carefully parsing the ordinances and reviewing the history of their enactment, it concluded that the ordinances had the purpose of suppressing the Santeria faith. But even the members of this Court could not agree on a methodology. Compare 508 U.S. at _____; *Id.* at _____ (Scalia, J., concurring); *Id.* at _____ (Souter, J., concurring). Other courts have only with difficulty unmasked

religious bigotry. *Mississippi Islamic Center v. City of Starkville*, 876 F.2d 465 (5th Cir. 1989) (variance); *Campos v. Coughlin*, 854 F.Supp. 194 (S.D.N.Y. 1994).

Public officials are aware that outright expressions of religious hostility are politically unacceptable and legally indefensible. As Judge Jerome Frank observed:

> Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled "Use me", like the cake, bearing the words "Eat me," which Alice found helpful in Wonderland.

F.W. Woolworth v. NLRB, 121 F.2d 658, 660 (2d Cir. 1941).

The drawing of inferences is a more difficult manner of proof than the use of direct evidence. It is fraught with uncertainty and the possibility of mistake. Congress had every reason to believe that the result would be religious discrimination going undetected. Congress was not just speculating. It heard extensive testimony to this effect from religious liberty practitioners.

Because many of its members began their careers at the local level, Congress was aware of the subtle ways in which bias can be disguised behind ostensibly neutral decisionmaking. Members were also aware that the more powerful churches are able to shape legislation to avoid conflicts with their religious practices. Smaller, less organized faiths are unable to protect themselves in the process either because they are unaware of it, or because of outright bias. To take an obvious case, Kosher ritual slaughter was permitted under the Hialeah ordinances, but Santeria ritual slaughter was not. *Church of the Lukumi Babalu Aye v. City of Hialeah*, *supra*, 508 U.S. at ____.

That the concern about hidden bias is weighty is illustrated by landmark preservation law. Whether a particular building is important enough to be landmarked, whether a particular alteration would destroy its historical value, and whether hardship has been demonstrated, are all highly discretionary judgments, easily subject to manipulation by multi-member decision making bodies in pursuit of religious or anti-religious agendas. Congress could and did readily conclude that discretionary decisionmaking is not easily reviewed for bias:

> After *Smith*, claimants will be forced to convince courts that an inappropriate legislative motive created statutes and regulations. However, legislative motive often cannot be determined and courts have been reluctant to impute bad motives to legislators.

H.R. Rep. 103-88 at 6.

The Senate Committee likewise found that governmental bodies will rarely reveal their intent to deliberately disadvantage religious minorities. It agreed with Justice O'Connor's observation that "few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such." S.Report 103-111 (103rd Cong. 1st Sess.) at 7. See also 42 U.S.C. 2000bb(a)(2) (same).

Moreover, this judgment finds empirical support in the related and equally discretionary area of church zoning. If one reviews church zoning cases decided in the last ten years, for example, one is struck by the inverse relationship between the size of a church and the number of church zoning cases involving it. There are at most a handful of cases involving Catholic, Methodist or Episcopal churches but dozens involving small evangelical churches and Orthodox Jewish synagogues. There is more than one reason for this phenomenon, but bias by decisionmakers (and communities) is surely an important one.

Indeed, if the testimony of religious liberty experts were not sufficient, and if the knowledge of members of Congress did not carry the burden of demonstrating that neutral laws often mask discrimination, this Court's decision in *Smith* would fill in the gap. The majority there acknowledged that the discriminatory availability of accommodation was one likely result of its judgment. 494 U.S. at 890.

RFRA ferrets out bias by requiring proof of a legitimate motive when government imposes a substantial burden on religious exercise. The compelling interest test, coupled with the least restrictive alternative inquiry, screens out those cases where the government's interest is not truly secular, but intended to suppress or disadvantage a faith. The stringency of the compelling interest test, and the requirement of a close fit between means and ends, are well designed to ensure that hidden bias does not go undetected..

B. Congress Has Broad Power to Guard Against Purposeful Religious Prejudice

It is common ground that within its sweep, the § 5 power is broad indeed. Like the enumerated powers of Art. I, § 8, the § 5 power includes:

> Whatever legislation is appropriate, that is, adopted to carry out the objective the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure all persons the enjoyment of perfect equality of civil rights and the equal protection of the law against State denial or invasions, if not prohibited, is brought within the domain of congressional power.

Ex Parte Virginia, 100 U.S. 339, 345-46 (1879).

Surely, Congress may "enforce submission to the prohibition" on intentional religious discrimination. Where a "violation lurks," Congress may act. *EEOC v. Wyoming*, 460

U.S. 226, 260 (1983) (Burger, C.J., dissenting). RFRA prohibits some actions that are not intentionally biased, but that sweep is constitutionally appropriate given the legitimate concern with "lurking" intentional religious discrimination and the difficulties of proof.

This broad power trumps the reserved power of the states. Speaking in the analogous context of the Fifteenth Amendment, this Court wrote: "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." Moreover, "Congress may take steps to permit litigation against states ...constitutionality impermissible in other contexts." *Fitzpatrick v. Bitker*, 427 U.S. 445, 453, n.9 (1976). *Accord City of Rome v. United States*, 446 U.S. 156, 172-78 (1980).

But Petitioners say [Brief at 35-36] that Congress did not make explicit findings that official religious discrimination is a substantial problem. This reflects the view of Justice Harlan, dissenting in *Morgan v. Katzenbach*, *supra*. The majority of the Court, though, held otherwise. "It is enough that we can perceive a rational basis for Congress to have acted as it did." 384 U.S. at 652-53. What has been said above about the existence of religious discrimination certainly satisfies this requirement. Petitioners' brief (*Id.*) can also be read to require Congress to consider the consequences of its lawmaking. Nothing in *Morgan v. Katzenbach*.

In *Fullilove v. Klutznick*, 448 U.S. 448, 477 (1980), this Court reiterated that formal findings were unnecessary in upholding an act that lacked them: "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative hearings." Justice Powell, concurring, likewise rejected such a requirement:

> [C]ongress is not expected to act as though it were duty bound to find facts and make conclusions of law.

> The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant ....

448 U.S. at 502-03.

C. RFRA is But the Latest Example of Congress' Exercise of a Broad § 5 Power

Congress has repeatedly prohibited conduct which is not itself illicit in order to ensure that prohibited conduct does not go unremedied.

i. Title VII and the States

A state violates the Equal Protection Clause only if it deliberately discriminates. *M.L.B. v. S.L.J.*, 65 U.S.L.W. 4035, 4042 (1996). A law which merely has an adverse impact is not unconstitutional. *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). Nevertheless, relying on § 5, Congress extended Title VII's adverse impact theory to the states on the ground that barring *de facto* discrimination was an appropriate way of ensuring that sophisticated forms of intentional discrimination did not go undetected. *Fitzpatrick v. Bitker*, 427 U.S. 445, 453, n.9 (1976); M. Pawa, When The Supreme Court Suppresses Constitutional Rights, Can Congress Save Us?, 141 U.Pa. L.Rev. 1029, n. 369 (1993) (collecting cases). RFRA is similarly justified.

ii. The Voting Rights Act

Congress' remedial powers were again invoked in *City of Rome v. United States*, 446 U.S. 156 (1980). Simultaneously

with its decision that the Fifteenth Amendment barred only intentional discrimination, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court upheld Congress' power to prohibit electoral changes having the effect of causing a retrogression in minority political power (42 U.S.C. § 1973):

> [T]he Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.

Congress in 1982 extended the effects test to all Voting Rights Act ("VRA") claims, including those arising under § 2. *Thornburg v. Gingles*, 478 U.S. 30 (1986). That extension, too, was unsuccessfully challenged. *Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984), aff'd *sub nom*, *Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1985), citing *Major v. Treen*, 574 F.Supp. 325, 342-49 (E.D. La. 1983). *Major* explained:

> Congress ... determined ... that the intent test inordinately burdened plaintiffs in vote dilution cases, was unnecessarily divisive due to the charges of racism which must inevitably be leveled against individual officials or entire communities, and ... compelled protracted, often futile, inquiries into the motives of officials who acted many years ago. .... Congress enact[ed] a legislative prophylaxis, calculated to forestall the institution of potentially discriminatory

> electoral systems and extirpate facially neutral devices or procedures which continue to expose minority voters to harmful consequences rooted in historical discrimination. (Citations omitted.)

The same rationale justifies VRA's ban on literacy tests. 42 U.S.C. §1973aa. Fairly administered, such tests are constitutional, *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). Nevertheless, this Court in *South Carolina v. Katzenbach*, 383 U.S. 307, 333-35 (1966), upheld a temporary statutory ban on literacy tests as against the claim that by preempting the judicial process of case-by-case litigation the Act violated the Court's core role of enforcing the Fourteenth Amendment. "On the contrary, § 2 of the Fifteenth Amendment expressly declares that Congress shall have power to enforce .... [The Framers] indicated that Congress was to be chiefly responsible for implementing the rights ..." protected by the Amendment. *Id.* at 325.

RFRA cannot be distinguished from the VRA cases on the ground that instances of religious bigotry are outweighed by a larger number of cases where bias is absent and hence that RFRA is too strong a remedy for whatever problem exists. How much undetected or unremedied bias to tolerate is a legislative question. Thus, under § 5 of the VRA (another exercise of Congress § 5 power) the Justice Department in 1995 interposed 19 objections out of a total of 3987 preclearance submissions. (Copies of the reports are lodged with the Clerk.) The question calls for a political judgment, one the Constitution commits to Congress.

Oregon v. Mitchell, 400 U.S. 112 (1970), upheld a permanent statutory ban on literacy tests. The multiple opinions of the Court were summarized in *Fullilove*:

> The [*Mitchell*] Court was unanimous, albeit in separate opinions, in concluding that Congress was within its

> authority to prohibit the use of such voter qualifications; Congress could reasonably determine that its legislation was an appropriate method of [foreclosing the possibility that purposefully discriminatory administration of literacy tests would escape undetected and] attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might have discriminatory effects only. (citations omitted).

448 U.S. at 477.[3]

Similar reasoning has lead courts to uphold application of the Americans With Disabilities Act to state prisons. See *Kaufman v. Carter*, 1996 W.L. 731925 (E.D. Mich. 1996); *Niece v. Fitzner*, 941 F.Supp. 1497, 1500-04 (E.D. Mich. 1994); *Armstrong v. Wilson*, 942 F.Supp. 1252, 60-61 (N.D. Cal. 1996).

D. The Framers of the Fourteenth Amendment Intended to Protect Religious Liberty

Chief Justice Rehnquist's dissent in *Hutto v. Finney*, 437 U.S. 678, 717-18 (1982), suggests that § 5 is broad only when applied to the guarantee against racial discrimination. No suggestion to this effect appears in any of the cases discussing the scope of Congress' power under § 5. It is supported neither by the text of the Fourteenth Amendment nor the ratification debates. Congress and the Courts have not acted as if such a limitation existed. Section 1983 is used equally to enforce the

---

3. *Fullilove*, 448 U.S. at 476-80 used this same analysis with regard to congressional power to enact contract set-asides. *Adarand Contruction, Inc. v. Pena*, 115 S.Ct. 2097 (1995), restricts the use of contract set-asides not because Congress lacks the power to enact broad remedies for discrimination, but because the Equal Protection Clause imposes special restraints on the use of race conscious remedies.

Due Process Clause, the Equal Protection Clause, and other incorporated rights.

Moreover, the legislative history of the Fourteenth Amendment demonstrates an intention to protect the free exercise of religion from state intrusion, including impingement by facially neutral laws. K. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exception Under the Fourteenth Amendment*, 88 N.W.U. L.Rev. 1106 (1994). Professor Lash demonstrates that, because the Fourteenth Amendment grew out of the national crisis over slavery, one of its goals was protecting religious liberty.

Sometimes invoking facially neutral laws, defenders of slavery silenced abolitionist religious voices and prevented slaves from having access to their religious materials. *Id.* at 1131-33. As Professor Lash puts it, "[t]he architects of the Fourteenth Amendment were well aware of how slavery had resulted in the suppression of religious exercise," *Id.* at 1146. They were determined to prevent a repetition:

> Religious exercise was to be protected from majoritarian hostility or indifference; it was to be a substantive right affording more than simply "equal protection"; and its protection created a zone of autonomy within which both mandatory and discretionary aspects of religious exercise were protected from government interference. Most important, by explicitly targeting "religiously neutral" laws as examples of what would become unconstitutional with the passage of the Fourteenth Amendment, men like John Bingham and Lyman Trumbull gave notice that in the future, generally applicable laws might sometimes impermissibly violate an individual's religious liberty.

88 N.W.U. L.Rev. at 1149.

E. The Legal and Political Background of the Fourteenth Amendment Supports Congress' Power To Enact RFRA

The fit between RFRA and the power of Congress to make certain that core violations of the Fourteenth Amendment do not go undetected and unremediated, does not exhaust the possible bases for an exercise of power under § 5. While others address these bases in a more comprehensive way, we believe that it is important to note that the political and legal background against which § 5 was written makes it unlikely that its drafters intended it to be given the narrow reading suggested by Petitioners. There is substantial reason to think that § 5 was intended to empower Congress to go beyond what the Constitution requires, provided only that it does not violate some other constitutional provision.

Section 5 reallocated power between the national legislature and the judiciary, and between the federal government and the states, because of abuses revealed during the slavery crisis. *Dred Scott v. Sanford*, 60 (19 Howard) U.S. 393 (1857), and *Ableman v. Booth*, 62 U.S. 506 (1858), helped spark the Civil War. Rectifying these judicial 'mistakes' was a primary goal of the drafters, A.Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1222-24 (1992). Those who enacted the Fourteenth Amendment were not about to entrust their handiwork solely to the same courts that had protected slavery. Section 5 insured that the Congress could define the rights protected by the Amendment, provided only that it observed the minimum standards imposed by the Amendment itself—the so-called one way ratchet. *City of Richmond v. J.A. Crosson*, 488 U.S. 469, 490 (1989) Opponents of ratification argued unsuccessfully that the Amendment should not be ratified because § 5 threatened federalism. See generally, J.B. James, The Ratification of the Fourteenth Amendment (1984).

Moreover, under then prevailing constitutional theory, there was no need to include § 5 to authorize Congress to implement § 1. In *Prigg v. Pennsylvania*, 42 U.S. 539 (1842), the Supreme Court held that, given the Constitution's protection for slave

ownership, Congress had the authority to protect it even without an explicit grant of power:

> If ... the Constitution guarantees the right ... the natural inference certainly is, that the national government is clothed with the appropriate authority and functions to enforce it. The fundamental principle ... would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted.

42 U.S. at 615-16. (Citations omitted.)

Supporters of the Fourteenth Amendment repeatedly invoked *Prigg*. E.M. Maltz, Civil Rights, The Constitution and Congress 1863-69, 64-66 (1996); R.J. Kaczorowski, The Nationalization of Civil Rights - Constitutional Theory and Practice in a Racist Society, 1866-1883 (1987) at 97. This Court has acknowledged *Prigg* to be the governing law at the time the Fourteenth Amendment was adopted. *Quern v. Jordan*, 440 U.S. 332, 343, n.14 (1979); *Monnell v. City of New York*, 436 U.S. 658, 672 (1988). It follows that § 5 was unnecessary to allow Congress to enforce §1 as written, but must have meant something more.

This political and legal background establishes that the drafters of the Fourteenth Amendment intended Congress to have broad latitude to assert its legislative power, and that the § 5 power is not narrowly confined to the exact metes and bounds of § 1. A more clear-eyed prescription for RFRA could hardly be imagined.

III. RFRA IS FULLY CONSISTENT WITH THE SEPARATION OF POWERS

Petitioners' separation of powers argument is even less substantial. Stripped to its essentials, the claim is that once this Court interprets the Constitution leading to certain real world results, Congress may do nothing to reach a different real world

result. Petitioners are not clear about the basis of this rule, but it appears to be motivated by a rule against judicial *lese majeste*. The point appears, moreover, to be one of timing. Had RFRA preceded *Smith*, it would not violate the separation of powers. It is the act of responding to this Court's decision which generates the argument.

Petitioners make this claim—for which they cite no precedent—in the face of this Court's invitation in *Smith* for legislative accommodation. Petitioners do not and cannot explain why Congress' response to that invitation is unconstitutionally disrespectful of the Court's authority. Petitioners' claim is also belied by well-worn political paths and judicial precedents.

A. Separation of Powers Doctrine Does Not Bar Corrective Legislation

Lassiter v. Northampton County Bd. of Elections, *supra*, held that the use of literacy tests was within the authority of the states to regulate the franchise. The VRA banned them. 42 U.S.C. §1973aa. Courts now decide challenges to literacy tests under a statutory standard, not a constitutional one; just as accommodation cases are now decided under a statutory standard, not a constitutional one. This Court has twice sustained these voting rights provisions. *Oregon v. Mitchell*, *supra*; *South Carolina v. Katzenbach*, *supra*.

In *City of Mobile v. Bolden*, *supra*, the Court held that *de facto* voting discrimination did not violate either the Fifteenth Amendment or the Voting Rights Act. This Court emphasized that there were important policy reasons to permit the states to use electoral devices with adverse racial consequences. 446 U.S. at 78-80; *id.* at 88-90 (Steven, J., concurring). Congress promptly amended the VRA to ban *de facto* electoral discrimination. 42 U.S.C. §1973. The legislative history of those amendments is as sharply critical of *Bolden* as the RFRA

Congress was of *Smith*. This revised statute has irrevocably changed the shape American politics.

Zurcher v. Stamford Daily, 436 U.S. 547 (1978), holds that the Fourth Amendment imposed no special restraints on searches of newspaper offices for evidence. This Court's opinion emphasized the importance to law enforcement of obtaining all possible evidence without delay or obstruction. 436 U.S. at 560-63. Congress did not agree with this Court's weighing of the respective interests of the press and police. The Privacy Protection Act of 1980, adopted the position of the *Zurcher* dissenters. 42 U.S.C. §2000aa. That newly created statutory right interfered with state interests recognized as valid by this Court.

Congress' willingness to sidestep the Court's constitutional decisions—subject to leaving the decision itself in place as an authoritative interpretation of the Constitution—is not limited to the field of civil rights. The Commerce Clause invalidates state regulation that interferes with the national market contemplated by the Constitution. Yet Congress has the power to tolerate just such interference under Art. I, § 8. This Court has even invited legislative revision of its Commerce Clause decisions. See, *e.g.*, *Barclays Bank PLC v. Franchise Tax Board*, 114 S.Ct. 2268, 2286 (1994).

B. RFRA Does Not Impose a Rule of Decision

Ex parte Klein, 13 Wall. 128 (1872) said that Congress may not prescribe a rule of decision for the courts, a holding that one court says invalidates RFRA. *Keeler v. Mayor and City of Cumberland*, 928 F.Supp. 591 (D. Md. 1996). It does not. *Klein* refused to enforce a statute directing the courts to ignore a presidential pardon. *Klein* is most narrowly read to stand only for the noncontroversial proposition that Congress may not undermine the presidential pardon power. RFRA trenches on no power exclusively committed to another branch. Congress did

say that the Free Exercise Clause means something other than what this Court says it means.

Even read more broadly, *Klein* does not invalidate RFRA. Every statute provides a rule for deciding disputes of decision. There is a dispositive difference between a legislature changing the law and acting as a super fact-finder. The former is the everyday business of legislatures, the latter intrudes upon the courts' core function. RFRA falls into the permissible category.

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), involved an environmental dispute. With litigation pending, Congress compromised the competing claims. The Ninth Circuit invalidated the compromise because it impacted on the litigation, purportedly in violation of *Klein*. This Court reversed, because Congress had changed the underlying substantive law. "Whatever the precise scope of *Klein* ... later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law,' *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 441 (1992)." *Plaut v. Spendthrift Farms, Inc.*, 115 S.Ct. 1447 (1995). RFRA fits this mold precisely.

C. *Klein* Does Not Proscribe Use of Legislative Standards

Keeler also invalidated RFRA because it was supposedly directed not at regulating the conduct of government officials, but solely at judges. 928 F.Supp. at 603-04. It reasoned that RFRA does not dictate results in specific cases (*e.g.*, protecting peyote consumption) but instead only prescribes a standard for determining which religious activities are protected. This reasoning is flawed. RFRA is not directed solely at the courts. It tells officials that they must take religious practice into account, and how they must do so. State and federal agencies are bound to abide by RFRA. State attorneys general have applied it. *Ark. O.A.G.*, 93-414, (1994); *Md. O.A.G.*, Opinion

94-037 (1994) (landmark preservation law fails RFRA). Only where there is a *bona fide* dispute is RFRA applied by a court.

RFRA's use of a "standard" as opposed to a specific rule is hardly unprecedented. Title VII prohibits state and local governments from using employment criteria that adversely impact minorities without justification. 42 U.S.C. §2000e-2. It does not say that specified criteria are illegal. The amended § 2 of the Voting Rights Act, 42 U.S.C. §1973, adopted by Congress in response to—indeed, by way of rejection of—*Bolden*, *supra*, *cf. Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986); *Id.* at 83-84 (O'Connor, J., concurring), does not proscribe any particular voting procedure. Modelling itself after a series of judicial decisions, it establishes a standard, not a rule.

Given the complexities of modern life, a rule proscribing generalized legislative standards would be wholly impracticable. It would also be a judicial intrusion on a grand scale into the operation of the legislature.

D. RFRA is Fully Consistent With *Marbury* and *Cooper*

Neither *Marbury v. Madison*, 5 U.S. 137 (1803), nor *Cooper v. Aaron*, 358 U.S. 1 (1958), holds that congressional action revisiting constitutional issues passed on by the Court is *per se* improper. *Marbury* merely holds that the Court is empowered to decide constitutional questions in cases properly before it. It does not say that no other branch acting within the proper scope of its constitutional authority can ameliorate the effects of a judicial decision. The holding of *Cooper* is that states may not unilaterally defease individual rights protected by the Fourteenth Amendment. *Cooper* is not a separation of powers case, but a preemption case.

That the Court has allowed Congress to ameliorate the practical implications of its decisions in favor of greater protection for individual rights than the Constitution provides, is

not mere prudence on its part. Rather, it reflects this Court's principled commitment to reconciling the separation of powers with checks and balances:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

"Separation of power principles are vindicated, not disserved, by measured cooperation between two political branches ... each contributing to a lawful objective throughout its own processes." *Loving v. U.S.*, 116 S.Ct. 1737, 1751 (1996). Thus, while only a court can convict someone of a crime, the President may nevertheless grant a pardon premised on the conclusion that the judiciary erroneously assessed guilt. The "Framers understood 'that a hermetic sealing off of these three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.'" *Id.* at 1743 citing *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

Loving does reassert the principle that one branch may not intrude on the core functions of another. RFRA does not violate that principle. The courts have the final say on what the Constitution means. In enacting RFRA, Congress did not usurp that role. Even today, the Free Exercise Clause means what *Smith* said it means. Moreover, Congress can repeal or modify RFRA at any time. It has already considered repealing RFRA as it applies to prisons. S.1093, 104th Cong., 1st Sess., Cong.Rec. (S)10895 (July 28, 1995). Congress cannot 'repeal' *Smith* or *Sherbert*.

CONCLUSION

The judgment below, that RFRA is facially constitutional, should be affirmed.

Respectfully submitted,

Marc D. Stern
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 360-1545

January 9, 1997

Oliver S. Thomas
Special Counsel
NATIONAL COUNCIL OF CHURCHES
2708 Montvale Road
Maryville, TN 37801
(423) 977-9046

J. Brent Walker
BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS
200 Maryland Avenue
Washington, D.C. 20002-5797
(202) 544-4226

Steven T. McFarland
Center for Law and Religious Freedom
CHRISTIAN LEGAL SOCIETY
4208 Evergreen Lane - Suite 222
Annandale, VA 22003
(703) 642-1070

Aron U. Raskas
Nathan Diament
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA
333 Seventh Avenue
New York, NY 10001
(212) 563-4000

Michael Farris
HOME SCHOOL DEFENSE ASSOCIATION
P. O. Box 159
Paeonian Springs, VA 22129
(703) 338-5600

Samuel Rabinove
Richard Foltin
AMERICAN JEWISH COMMITTEE
165 East 56th Street
New York, NY 10022
(212) 751-4000

Elliot Mincberg
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, DC 20036
(202) 467-4999

David Zwiebel, Esq.
AGUDATH ISRAEL
84 William Street
New York, NY 10038
(212) 797-9000

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION
132 West 43rd Street
New York, NY 10036
(212) 382-0557

Steven K. Green
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1816 Jefferson Place
Washington, DC 20036
(202) 466-3234

Jack F. Trope
ASSOCIATION OF AMERICAN INDIAN AFFAIRS
P.O. Box 268
Sisseton, SD 57262
(605) 698-3998